

TRANSFER OF TITLE IN BANKRUPTCY: THE DEBTOR'S RIGHTS OF ACTION*

BECAUSE of a failure to construe properly the relationship between subsections 70(a)(5) and 70(a)(6) of the Bankruptcy Act,¹ some courts have incorrectly exempted certain of a bankrupt's rights of action from the claims of his creditors. Section 70(a) vests the trustee in bankruptcy with title to most of the bankrupt's assets,² for the purpose of distributing these assets to creditors.³ When questions arise as to the relative title of the trustee and the bankrupt to rights of action accruing before the bankruptcy petition is filed,⁴ subsections 70(a)(5) and (6) together "blanket the field."⁵ Subsection 70(a)(5) provides that the trustee shall be vested with title to

property, including rights of action, which prior to the filing of the petition . . . [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered⁶

Subsection 70(a)(6) grants the trustee title to

rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property.⁷

Though the rights of action enumerated in 70(a)(6) would seem to pass to the trustee without qualification, not all courts have recognized that subsection as wholly independent. The language of 70(a)(5) embraces all property including rights of action,⁸ and this fact, coupled with the ease of applying the

*Jones v. Hicks, 358 Mich. 474, 100 N.W.2d 243 (1960).

1. 52 Stat. 880 (1938), 11 U.S.C. §§ 110(a)(5),-(6) (1958).

2. See *In re Lustron Corp.*, 184 F.2d 789 (7th Cir. 1950); *Kirby v. Fitzgerald*, 57 S.W.2d 362, 367 (Tex. Civ. App. 1933). See generally 4 COLLIER, BANKRUPTCY ¶ 70.04 (1940) [hereinafter cited as COLLIER]; MACLACHLAN, BANKRUPTCY § 169 (1956) [hereinafter cited as MACLACHLAN].

3. The distribution, of course, is not complete. The bankrupt is assured a fresh start by means of retaining those assets which do not pass to the trustee under § 70 and is further awarded both federal and state exemptions recognized by § 6 of the Bankruptcy Act. 52 Stat. 847 (1938), 11 U.S.C. § 24 (1958). See generally MACLACHLAN §§ 157-67; 1 COLLIER ¶¶ 6.07-17; Comment, 68 YALE L.J. 1459 (1959).

4. One of the most important changes made in § 70 by the 1938 amendment to the Bankruptcy Act was to provide specifically that title vests in the trustee as of the time of filing the petition in bankruptcy. Previously the Act had vested title as of the date of adjudication, thus leaving an often troubling time lag, ideal for looting the estate, between filing the petition and the adjudication. See *Hearings on the Revision of the Bankruptcy Act Before the House Committee on the Judiciary*, 75th Cong., 1st Sess., ser. 9, at 210-12 (1937).

5. 4 COLLIER ¶ 70.28 at 1240.

6. 52 Stat. 880 (1938), 11 U.S.C. § 110(a)(5) (1958).

7. 52 Stat. 880 (1938), 11 U.S.C. § 110(a)(6) (1958).

8. This broad language has suggested to some courts that all property that could pass to a trustee must come within the section. See, e.g., *Horton v. Moore*, 110 F.2d 189 (6th Cir. 1940); *Brown v. Crawford*, 252 Fed. 248 (D. Ore. 1918); *In re Cantelo Mfg. Co.*, 185

subsection,⁹ has apparently induced many courts to apply its criteria—transferability or subjection to levy under state law—to all disputes over a trustee's claim to rights of action.¹⁰ Subsection 70(a)(6) is either disregarded¹¹ or considered merely as a list of some actions that will pass to the trustee if transferable under state law.¹²

The recent case of *Jones v. Hicks*¹³ illustrates the need for clarifying the relationship between these two provisions of the Bankruptcy Act. A creditor had obtained judgment against his debtor, and, to satisfy the judgment, a writ of execution was delivered to the sheriff. Levy was made on a pickup truck owned by the debtor and worth approximately 1100 dollars. The truck was sold at an execution sale for 375 dollars to a bidder who allegedly was acting as a "dummy purchaser" for the sheriff; the purchaser later transferred the truck to the sheriff for the amount of the price paid at the sale. Between the time of the execution sale and this subsequent transfer, the debtor filed a voluntary petition in bankruptcy.¹⁴ The trustee in bankruptcy, asserting his powers over the assets of the bankrupt's estate,¹⁵ brought suit against the sheriff and his surety under a Michigan statute which provides that a public officer guilty of fraud in the conduct of an execution sale shall be liable to the injured party for five times the amount of actual damages sustained.¹⁶ The lower court dismissed the complaint with prejudice,¹⁷ and the Supreme Court of Michigan affirmed in a divided opinion.¹⁸

Fed. 276 (D. Me. 1911). *But see* *Bush v. Export Storage Co.*, 136 Fed. 918, 922-23 (E.D. Tenn. 1904).

9. The tests of transferability and leviability are administered with obvious advantages of simplicity by ready reference to state law, and have accordingly been praised. See 4 COLLIER § 70.15[2]. For cases applying this test, see generally Annot., 16 A.L.R.2d 839 (1951).

10. See, e.g., *In re Baxter*, 104 F.2d 318 (6th Cir. 1939) (action to recover sums deducted from employee's wages); *Bonvillain v. American Sugar Ref. Co.*, 250 Fed. 641 (E.D. La. 1918) (fraud action); *Charness v. Katz*, 48 F. Supp. 374 (E.D. Wis. 1943) (action to recover gambling losses); *Brown v. Guarantee Ins. Co.*, 155 Cal. App. 2d 679, 319 P.2d 69 (Dist. Ct. App. 1957) (action for damages because of insurer's alleged bad faith in refusal to settle claim); *Heitfeld v. Benevolent & Protective Order of Keglars*, 36 Wash. 2d 685, 220 P.2d 655 (1950) (action to recover gambling losses); *Long v. Gump*, 8 Ohio N.P. (n.s.) 117 (C.P. 1909) (action for fraudulent conspiracy in transferring property).

11. See, e.g., *Brown v. Guarantee Ins. Co.*, 155 Cal. App. 2d 679, 319 P.2d 69 (Dist. Ct. App. 1957).

12. See, e.g., *Charness v. Katz*, 48 F. Supp. 374 (E.D. Wis. 1943).

13. 358 Mich. 474, 100 N.W.2d 243 (1960).

14. See Brief for Appellant, p. 3, *Jones v. Hicks*, 358 Mich. 474, 100 N.W.2d 243 (1960) [hereinafter cited as Brief for Appellant].

15. The trustee is empowered to exercise those powers of the bankrupt which the latter might have exercised for his own benefit. Section 70(a)(3), 52 Stat. 880 (1938), 11 U.S.C. § 110(a)(3) (1958). See also 66 Stat. 422 (1952), 11 U.S.C. § 29(e) (1958).

16. MICH. STAT. ANN. § 27.1647 (1935).

17. The lower court's opinion is printed in Appellant's Appendix, pp. 33a-34a, *Jones v. Hicks*, 358 Mich. 474, 100 N.W.2d 243 (1960) [hereinafter cited as Appellant's Appendix].

18. This opinion also affirms the lower court on the alternative grounds, not pertinent here, that the plaintiff's declaration and opening statement did not state a cause of action.

The majority of the Michigan Supreme Court pointed out that the sheriff's acquisition of the truck, if wrongful, created two rights of action in the bankrupt—a common-law claim of conversion and the statutory claim of fraud. Conceding that the conversion action could pass to the trustee, because it was assignable under Michigan law,¹⁹ the court found that the trustee had waived this cause of action by affirming the sale and suing in fraud. The fraud claim, however, was held not to pass to the trustee, since well-established Michigan law has labeled fraud actions personal and nonassignable.²⁰ In making these determinations of assignability and nonassignability, the court was apparently relying on the tests set forth in subsection 70(a)(5).²¹ The dissent, while accepting the majority's position that an action for fraud is nonassignable, felt that a different conclusion was warranted because the case involved more than a "naked right to institute a cause of action based on fraud."²² The dissenting justices reasoned that because the bankrupt had a choice of suing in conversion he still had title to the truck, that such title passed to the trustee, and that the fraud claim could have been passed on to the trustee as an incident of title to the truck.²³ This argument was rejected by the majority on the ground that the sheriff held a voidable title which left the bankrupt only with power to claim title in himself, not title per se, at the time of filing the petition.²⁴

Mired in the controversy over the location of title, neither opinion analyzes the validity of its basic premise: that the ultimate test of whether title to a right

19. Michigan law has long held that an action for conversion of property, being based on an assignable property right, is itself assignable, though a similar action seeking damages is generally not assignable. See, *e.g.*, *Smith v. Thompson*, 94 Mich. 381, 54 N.W. 168 (1892). *But see* RESTATEMENT, TORTS § 222 (1934).

20. See, *e.g.*, *Cochran Timber Co. v. Fisher*, 190 Mich. 478, 157 N.W. 282 (1916); *Smith v. Thompson*, 94 Mich. 381, 54 N.W. 168 (1892).

Though the Michigan cases clearly hold that fraud actions are not assignable, the Michigan survival statute states that actions for deceit will survive the injured party's death. MICH. STAT. ANN. § 27.684 (1938). Since it has generally been held that survivability and assignability are interchangeable terms, see, *e.g.*, *Long v. Gump*, 8 Ohio N.P. (n.s.) 117 (C.P. 1907); *Stebbins v. Dean*, 82 Mich. 385, 46 N.W. 778 (1890); 4 CORBIN, CONTRACTS § 886 (1951), it is arguable that under this statute fraud actions should be assignable. *Hicks v. Steel*, 142 Mich. 292, 105 N.W. 767 (1905) (*semble*). Though both the majority and the dissent fail to deal with this question, it was argued by both sides in the principal case. See Brief for Appellants, pp. 14-17; Brief for Appellees, pp. 3-5, *Jones v. Hicks*, 358 Mich. 474, 100 N.W.2d 243 (1960).

21. Under the tests provided by this section, at least, the court's opinion seems sound if the Michigan position on the nonassignability of fraud claims is accepted. None of the other means of passing property suggested by the definition of "transfer" in § 1(30) of the Bankruptcy Act seem to represent possibilities for the present trustee. 66 Stat. 420 (1952), 11 U.S.C. § 1(30) (1958). For an interesting discussion of the soundness of the present decision from the standpoint of the assignability or nonassignability of the claim, see Note, 9 DE PAUL L. REV. 303 (1960).

22. 358 Mich. at 477, 100 N.W.2d at 249.

23. 358 Mich. at 478-79, 100 N.W.2d at 250.

24. The majority's position seems to be in accord with previous Michigan decisions. *Cochran Timber Co. v. Fisher*, 190 Mich. 478, 157 N.W. 282 (1916). For the conceptual

of action passes to the trustee is solely whether the action is considered assignable under state law. Under the Michigan court's approach, subsection 70(a) (6) is in effect read out of the act, and the applicability of that subsection to the fraud action never considered. Although this interpretation of the Bankruptcy Act accords with some previous decisions,²⁵ the existence of conflicting interpretations suggests that further analysis of the court's premise is needed. For example, bankruptcy decisions dealing with fraud actions involving purely pecuniary loss have pointed out that such actions are based on an "injury to property" under 70(a) (6) and have disregarded questions of assignability as irrelevant.²⁶ Also notable are two cases involving rights of action for libel to corporations.²⁷ In both cases it was contended that such rights of action could not pass to a trustee in bankruptcy since they were not subject to transfer or attachment under state law; conceding the lack of transferability, the courts nevertheless found that since a corporation, as a nonpersonal entity, could suffer only pecuniary loss from libelous treatment,²⁸ the right of action must have arisen from an "injury to property" within the meaning of subsection 70(a) (6), and therefore passes to the trustee whether or not it is transferable under state law.²⁹

The interpretation of subsection 70(a) (6) as an independent section which passes title to rights of action irrespective of their transferability might be at-

distinction between "void" and "voidable," see *City of Marion v. Sickles*, 105 Ohio App. 495, 500, 152 N.E.2d 813, 817 (1957); *Cummings v. Powell*, 8 Tex. 80 (1852).

In addition to its bankruptcy consequences, however, the majority opinion has an unfortunate effect on state policy. The quasi-criminal policy of ensuring integrity in public office—the obvious aim of the Michigan quintuple damage statute—may be frustrated by the decision. In the future cases the trustee would make the only choice open to him and sue in conversion, thereby cutting off the penalty element of the statute.

25. See note 10 *supra* and accompanying text.

26. [T]he Bankruptcy Act, in providing among the rights of action for torts which shall and which shall not pass to the trustee, has adopted its own line of distinction, and this does not necessarily follow any of the distinctions observed elsewhere or for other purposes.

In re Gay, 182 Fed. 260, 262 (D. Mass. 1910); *accord*, *Tamm v. Ford Motor Co.*, 80 F.2d 723 (8th Cir. 1935); *Henderson v. Binkley Coal Co.*, 74 F.2d 567 (7th Cir. 1935); *In re Harper*, 175 Fed. 412 (N.D.N.Y. 1910); *Wells v. Lloyd*, 6 Cal. 2d 70, 56 P.2d 517 (1936); *Remmers v. Remmers*, 217 Mo. 541, 117 S.W. 1117 (1909); *Connelly v. National Surety Co.*, 35 Ohio App. 76, 171 N.E. 870 (1929).

27. *Empire Tractor Corp. v. Time, Inc.*, 91 F. Supp. 311 (E.D. Pa. 1950); *In re New York Woman*, 34 F. Supp. 831 (S.D.N.Y. 1940).

28. *Cf. Hansen Mer. Co. v. Wyman, Partridge & Co.*, 105 Minn. 491, 117 N.W. 926 (1908).

29. *Accord, In re Leibowitz*, 93 F.2d 333 (3d Cir. 1937) (contract right will pass whether or not capable of being assigned) (*dictum*); *Brownlow v. Davis*, 69 Ga. App. 111, 25 S.E.2d 150 (1943) (action to recover gambling losses); *Cleland v. Anderson*, 75 Neb. 273, 105 N.W. 1092 (1905) (antitrust action).

But see Milwaukee Mut. Fire Ins. Co. v. Sentinel Co., 81 Wis. 207, 51 N.W. 440 (1892) (receiver of an insolvent corporation was not permitted to pursue an action for libel to the corporation because such an action was personal and not assignable).

tacked by arguing that such an interpretation renders the main body of subsection 70(a)(5) superfluous as to rights of action. After 70(a)(5) declares that "property including rights of action" will pass to the trustee if *either* transferable *or* subject to levy, a proviso states:

Provided, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the state such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process
 . . .³⁰

Thus, contrary to the general rule of 70(a)(5), title to the various rights of action named in the proviso will not pass to the trustee if they are transferable but not subject to levy. Since the proviso appears to cover almost every claim arising from personal injuries, the only rights of action subject to the "transferability *or* levy" test of the main body of 70(a)(5) would be those arising from injuries to property interests. But, if 70(a)(6) were construed to give the trustee in bankruptcy title to claims for "injury to property" without any "transferability" test, the main body of 70(a)(5) would apply to few if any rights of action. Thus, the interpretation of 70(a)(6) as an independent section would create the unusual situation that almost all the rights of action covered by 70(a)(5) are actually covered by the proviso alone.

The alternative view, however,—that all rights of action, including those based on injuries to property, are subject to the tests of 70(a)(5)—also creates a problem of superfluity, for then 70(a)(6) has no function. Arguably, this objection can be met by pointing out that the phrase "rights of action" was added to 70(a)(5) in 1938, long after 70(a)(6) had been enacted,³¹ thus, the continued existence of 70(a)(6) may be merely a drafting oversight of the 1938 revisors. The legislative history of the 1938 amendment disproves this contention, however, for the House Report explains the specific inclusion of "rights of action" in 70(a)(5) as a declaration of existing law.³² If 70(a)(5)

30. 52 Stat. 880 (1938), 11 U.S.C. § 110(a)(5) (1958).

31. The essential part of subsection 70(a)(6) was enacted in the Bankruptcy Act of 1898, 30 Stat. 566. See 4 COLLIER ¶ 70.03.

32. "The changes in clause (5) are declaratory of the existing law, and are therefore clarifying and tend to avoid misunderstanding and misconstruction." H.R. REP. No. 1409, 75th Cong., 1st Sess. 34 (1937).

Section 70(a)(6) also was changed by the addition of "usury" to the rights of action it enumerates. As a right of action to recover usurious interest could be considered as arising upon the unlawful taking or detention of property, this change was also made essentially for the sake of clarity in the language of the Act and uniformity in the decisions under it. *Ibid.*

Prior to 1938 section 70(a)(6) was the only clause in the Act which explicitly dealt with passage of title to rights of action; § 70(a)(5) used only the general term "property." Most courts had interpreted "property" to include rights of action. See, e.g., *In re Burnstine*, 131 Fed. 828 (E.D. Mich. 1903); *Sibley v. Nason*, 196 Mass. 125, 81 N.E. 887 (1907). A few courts, however, were not sure whether both sections, or only § 70(a)(6), were directed toward rights of action. *Cleland v. Anderson*, 66 Neb. 252, 273-76 (1902); *Gur-*

originally applied to rights of action, the enactment of 70(a)(6) would have been surplusage even then unless it were somehow a qualification of 70(a)(5), a carving out of certain rights of action which are intended to pass to the trustee whether or not transferable under state law.³³

The policies underlying the Bankruptcy Act favor interpretation of 70(a)(6) as an independent section meriting independent application. The fundamental purpose of bankruptcy is to compensate creditors by distributing to them shares of an insolvent debtor's estate.³⁴ Thus a wrong to the debtor's estate strikes at the interest of his creditors, and they have a valid claim to a right of action arising from such a wrong.³⁵ This policy is embodied in subsection 70(a)(6). The gravamen of the rights of action enumerated in this section—those arising upon contracts, usury, or injury to property—is pecuniary loss to and diminishment of the bankrupt's estate, and, as the trustee takes over the bankrupt's interest in that estate, there seems no compelling reason for conditioning his title to such rights of action.³⁶ Bankruptcy also exists, however, to preserve the sanctity of the bankrupt's person and to permit him a fresh start in his financial affairs.³⁷ It seems offensive to a basic

fein v. Howell, 142 Va. 197, 202, 128 S.E. 644, 645 (1925). To such courts, rights of action such as wrongful death claims would, without meaningful distinction, be exempted from the creditors' claims. Conflict of decision arose. *Compare Dent v. Town of Mendenhall*, 139 Miss. 271, 104 So. 82 (1925), with *In re Fahys*, 18 F. Supp. 529 (S.D.N.Y. 1937), and *In re Burnstine*, 131 Fed. 828 (E.D. Mich. 1903). These cases, as well as others, and their relation to the 1938 amendments of § 70 are fully discussed in *McNeilly v. Furman*, 47 Del. (8 Terry) 565, 95 A.2d 267 (1953). See generally 4 COLLIER ¶ 70.28; Note, 37 MINN. L. REV. 627 (1953).

33. The only qualification that the specific list of rights of action in § 70(a)(6) can make on the general provisions of § 70(a)(5) is that the listed rights will pass regardless of the tests set forth in § 70(a)(5). It could have been argued prior to the 1938 amendment that another qualifying role was possible. Starting with the proposition that all rights of action are essentially property, the specific provisions of § 70(a)(6) could have limited the more general scope of § 70(a)(5) so that only those rights of action that fell within the categories of § 70(a)(6) and also met § 70(a)(5)'s overarching standards of transferability would pass to the trustee. Cf. *Ruebush v. Funk*, 63 F.2d 170, 172 (4th Cir. 1933); *Young v. Roodner*, 123 Conn. 68, 192 Atl. 710 (1937). But the addition of the proviso makes clear that § 70(a)(5) applies to other rights of action than those specified in § 70(a)(6), and that this alternative qualifying role of § 70(a)(6) is, in fact, untenable.

34. "The object of the Bankruptcy Act is to benefit creditors by making all the pecuniary means and property available to their payment . . ." *Gochenour v. Cleveland Terminals Bldg. Co.*, 118 F.2d 89, 93 (6th Cir. 1941); see *West Texas Const. Co. v. Nelson*, 77 F.2d 754, 755 (5th Cir. 1935); *In re Austin Resort & Land Co.*, 12 F. Supp. 459, 462 (N.D. Cal. 1935).

35. *Compare Tamm v. Ford Motor Co.*, 80 F.2d 723 (8th Cir. 1935), and *In re Gay*, 182 Fed. 260, 262 (D. Mass. 1910), with *Tufts v. Matthews*, 10 Fed. 609, 611 (D. R.I. 1882).

36. See, e.g., *Constant v. Kulukundis*, 125 F. Supp. 305 (S.D.N.Y. 1954); *In re Harper*, 175 Fed. 412 (N.D.N.Y. 1910).

37. [T]he release of the honest, unfortunate, and insolvent debtor from the burden of his debts and . . . [his restoration] to business activity, in the interest of his family and the general public, is one of the main, if not the most important, objects of the law.

sense of morality and decorum to permit creditors to capitalize on a bankrupt's personal misfortunes, such as injury to his physical being,³⁸ reputation³⁹ or future capacity as an individual.⁴⁰ The law of assignments—incorporated by the tests of 70(a)(5)—to a certain extent mirrors the distinction between injuries to property and injuries to the person; property rights are generally assignable while personal rights are not.⁴¹ But this distinction, as it has developed historically in the various states, has been blurred by another historical influence—the common-law prejudice that the assignment of rights of action is a source of barratry and maintenance.⁴² Thus, rights of action which are assignable in some states under “the modern trend in favor of assignability”⁴³ are unassignable in other states because such action would be “void as against public policy and savoring of maintenance.”⁴⁴ The term “personal,” used as a synonym for “nonassignable” in many cases, often becomes a mere label with little or no relation to the more meaningful phrase “injury to the person.”⁴⁵

Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 588, 591 (5th Cir. 1908); see *Williams v. United States Fid. Guar. Co.*, 236 U.S. 549, 554 (1915); *In re Houtman*, 287 Fed. 251, 252 (E.D.N.Y. 1923).

38. It is not, and never has been, the policy of the law to coin into money for the profit of his creditors the bodily pain, mental anguish or outraged feelings of a bankrupt.

Sibley v. Nason, 196 Mass. 125, 131, 81 N.E. 887, 889 (1907); see, e.g., *In re Haensell*, 91 Fed. 355 (D. Cal. 1899); *Grinnel v. Carbide & Carbon Chems. Corp.*, 282 Mich. 509, 276 N.W. 535 (1937).

39. See, e.g., *Dillard v. Collins*, 66 Va. (25 Gratt.) 343 (1874) (action for slander).

40. Protection of this personal interest is best displayed in cases dealing with rights involving implications of broader range than success or defeat in maintaining a right of action. See, e.g., *Heyl v. Emery & Kaufman, Ltd.*, 204 F.2d 137 (5th Cir. 1953) (policy expiration records remain with bankrupt insurance agent); *In re Leibowitz*, 93 F.2d 333 (3d Cir. 1937) (a bankrupt's future earning capacity or commissions coming due to him after the adjudication are considered “personal” on the ground that to give creditors power over such rights would place the bankrupt in a kind of “involuntary servitude” after his supposed discharge).

41. The assignability of things in action is now the rule; nonassignability the exception. And this exception is confined to wrong done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage.

Meech v. Stoner, 19 N.Y. 26, 29 (1859); see *Federal Gravel Co. v. Detroit & Mackinac Ry. Co.*, 263 Mich. 341, 248 N.W. 831 (1933); *Hansen Mer. Co. v. Wyman, Partridge & Co.*, 105 Minn. 491, 117 N.W. 926 (1908); 4 CORBIN, CONTRACTS § 886 (1951).

42. See Appellant's Appendix, p. 23a; 4 CORBIN, CONTRACTS § 886 (1951); 6 *id.* §§ 1422, 1427. For the historic definition of these crimes, see 4 BLACKSTONE, COMMENTARIES 168-71 (Am. ed., Hammond, 1890). Their relation through the years to the law of assignments is discussed in Winfield, *Assignments of Choses in Action in Relation to Maintenance and Champerty*, 35 L.Q. Rev. 143 (1919).

43. *Brown v. Guarantee Ins. Co.*, 155 Cal. App. 2d 679, 695, 319 P.2d 69, 79 (Dist. Ct. App. 1957).

44. *Grand Trunk W.R. Co. v. H. W. Nelson Co.*, 116 F.2d 823, 836 (6th Cir. 1941).

45. Thus, the *Hicks* court labeled the fraud action personal, though the only injury suffered was injury to the bankrupt's property. See text accompanying note 49 *infra*. For

The Bankruptcy Act, by automatically vesting rights of action arising upon injuries to property in the trustee under subsection 70(a)(6), would avoid any detriment to the interests of creditors from this historical prejudice and, as a collateral effect, would promote the uniform application of the Act.⁴⁶ Title to claims arising from personal injury, on the other hand, may conveniently be governed by the tests of 70(a)(5), for their retention by the bankrupt will not seriously deplete the estate. The fact that some personal injury claims will be given to creditors under this section if subject to levy or attachment can be justified as deference to the state's own policy of protecting creditors, since outside bankruptcy such rights of action could have been levied upon.

To ensure the proper administration of a bankrupt's estate, therefore, a court awarding title to a right of action should first make the determination whether the right arose from an injury to property specified in 70(a)(6). If it does, the transferability and levy tests of 70(a)(5) are irrelevant and title should pass to the trustee. In the light of the policies expressed by the Bankruptcy Act, the phrase "injury to property" should be construed as meaning any actionable wrong to property which would diminish the bankrupt's estate to the detriment of creditors, rather than being construed as physical harm to tangible property.⁴⁷ In *Jones v. Hicks*, for example, the court should have

other examples of assignability not based upon the person-property distinction, see cases cited in notes 19 & 29 *supra*.

46. Passage to the trustee of rights of action without reference to state law does not prejudice the rights of states; the reference to state law in § 70(a)(5) is based on definitional convenience, not on constitutional necessity.

[I]t would be strange if the dominant grant to Congress to legislate upon bankruptcy and insolvency, and which, when exercised, supersedes state legislation respecting these matters, should nevertheless be subordinate to the right of each state to determine what is or shall be property, subject to the terms of the Bankruptcy Act.

Board of Trade v. Weston, 243 Fed. 332, 335 (7th Cir. 1917).

47. See, e.g., *Tamm v. Ford Motor Co.*, 80 F.2d 723 (8th Cir. 1935); *Brown v. Guarantee Ins. Co.*, 155 Cal. App. 2d 679, 319 P.2d 69 (Dist. Ct. App. 1957). The phrase "injury to property" is not included among the statutory definitions in § 1 of the Bankruptcy Act. 66 Stat. 420 (1952), 11 U.S.C. § 1 (1958). A similar phrase in § 17 of the Act, 52 Stat. 851 (1938), 11 U.S.C. § 35 (1958), has been held even in Michigan to extend to intangible and abstract property rights. *Probst v. Jones*, 262 Mich. 678, 247 N.W. 779 (1933).

In applying this broad test two potential problems may arise. First, the concept of "property" may vary depending on whether the bankrupt is a corporation or an individual. See note 28 *supra* and accompanying text. Second, and more important are the problems raised by mixed causes of action which contain elements of wrongs to both the bankrupt's person and his property.

In more simple cases the personal and property losses can perhaps be separated. It has been held that a bankrupt retains his action for personal injuries in a car collision, while the trustee may succeed to the action for damage to the car. *Ruebush v. Funk*, 63 F.2d 170 (4th Cir. 1933). But to attempt to effect a like severance in more complex cases might lead only to procedural extravagance and unnecessary expense for the bankrupt estate.

Problems might arise, for example, if the bankrupt is personally slandered and suffers special damages in the falling off of business. For the view that logic, at least, presents no barriers to a splitting of such actions, see Note, 24 So. CAL. L. REV. 190 (1951).

decided whether the fraud action fell under 70(a)(6), and only then, if necessary, turned to the problems of title and transferability.⁴⁸ Since the fraud represented a diminution of the bankrupt's estate, a purely pecuniary loss, without personal harm to the bankrupt, the action would seem to qualify as arising upon an "injury to property."⁴⁹ The "windfall" element of quintuple damages should not change the character of the claim to "personal," for in theory the statutory penalty exists only to satisfy the state's policy of punishing the sheriff. Nor is the Bankruptcy Act averse to giving such a bonus to creditors, since in any event the creditors can get only their pro rata shares of what they are actually owed.⁵⁰

48. As a matter of fact, though this point is not discussed by the court, the appellant in the *Hicks* case brought suit squarely upon § 70 (a) (6) without reference to subsection (5). See Appellant's Appendix, pp. 3a-4a.

49. The court's acknowledgment of the possible conversion action—"an unlawful taking and detention of property"—should have dispelled any doubt as to the character of the claim. Whether the action takes the form of a statutory claim for fraud or a common-law claim for conversion, the wrong from which it arises remains the same unlawful taking of the bankrupt's truck.

50. Trustees have been awarded treble damages in antitrust suits on the grounds that such suits are based on an "injury to property." See, *e.g.*, *Fazakerly v. E. Kahn's Sons Co.*, 75 F.2d 110 (5th Cir. 1935); *Imperial Film Exch. v. General Film Co.*, 244 Fed. 985 (S.D.N.Y. 1915). As to the general irrelevance of penalty bonuses to the assignability or nonassignability of rights of action, see *Holmes v. Loud*, 149 Mich. 410, 112 N.W. 1109 (1907) (dictum).

Also, property inherited within six months after an adjudication as a bankrupt, though a windfall, will pass to the trustee under § 70(a)(8) of the Bankruptcy Act. See, *e.g.*, *In re Carl*, 38 F. Supp. 414 (W.D. Ark. 1941).